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IN THE

Supreme Court of the United States

No. 285, October Term, 1924.

Southern Pacific Company, *Appellant*,

vs.

The United States.

Appeal from the Court of Claims.

REPLY BRIEF FOR APPELLANT.

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I.

The brief for the Government divides the balances claimed in this case on account of land-grant deductions into those covered by appellant's bills or vouchers which bore no protest, regardless of when the transportation referred to was performed, and those which bore either the short or long form of protest; whereas ap-

pellant divides such vouchers into those rendered prior to January 1, 1914, on which date it began formally to accept payment at land-grant rates under protest, and those rendered subsequent to that date. Appellant submits that its classification should be adopted because, *after January 1, 1914,* the Government was fully apprised (whether each and every one of the vouchers submitted by it bore a formal protest or not) that land-grant deduction on the classes of persons referred to herein was *not* being conceded.

II.

It appears from their brief that counsel for the Government, in this court, are trying to construct a different agreement between the appellant and the United States from that under which the service was actually performed.

The theory of Government counsel, as we understand it, is that, as appellant knew that the Comptroller of the Treasury had ruled that the several classes of persons referred to in this case were entitled to the reduced fares stipulated for the transportation of "troops of the United States," and as the appellant did not insist, *prior* to January 1, 1914, upon its right to collect full commercial fares for the transportation of these classes that were not *in fact* "troops of the United States," it must be held to have "agreed," *both as to the transportation occurring prior and that occurring subsequent to January 1, 1914,* to transport such persons at land-grant fares, notwithstanding that, after said date, in rendering its bills or vouchers for such transportation to the Government disbursing officers upon

a land-grant basis, it expressly stated on such bills, or a very large number of them, that it was accepting payment on that basis under protest.

This argument of counsel for the United States, we submit, is based upon an entire misconception of the relations existing between the railroads of the country and the Government, as affected by the railroad land-grant laws and the land-grant equalization agreements referred to in Findings of Fact II and III (Rec., 5), as well as by the restrictive provisions of the Army Appropriation Acts with respect to payments to land-grant railroads. All that has ever been required by the railroad land-grant laws and the provisions of the Army Appropriation Acts with respect to land-aided railroads, and all that has ever been agreed to by the railroads in the land-grant equalization agreements, is that "*troops and property of the United States*" should be transported at not exceeding 50% of the fares and rates paid by private persons.

And as it has always been customary for the railroads to transport persons and property for the Government *without prepayment of charges,* the understanding and agreement between the railroads and the Government has always been (in the absence of an *express* agreement stipulating for different terms) that the amounts due the railroads for any such transportation were to be determined upon the basis of the applicable published tariff fares or rates on file with the Interstate Commerce Commission, less appropriate deductions on account of any land-grant distance involved, *where the persons or property transported fell within the category of "troops and property of the United States."* There is no authority or room, in

the long-established relationship between the carriers and the Government, for the construction, by the courts, of an *implied* agreement on the part of the railroads, to transport persons and property for the Government, such as that suggested by counsel for the Government in their brief in this case.

When, therefore, appellant transported the persons referred to in this case for the Government, it did so upon the understanding (there being no other charge *expressly* agreed upon) that it would be paid for such transportation at full commercial fares, *unless* the persons transported constituted a part of the "troops of the United States" within the meaning of the railroad land-grant Acts, and with the further understanding that, if the executive officers of the Government would not pay for such transportation on the basis to which appellant was legally entitled, it would have the right to sue in the Court of Claims for any balances due it on that account, within the period of limitation prescribed by law.

It is true that this Court held, in the *Oregon-Washington Case,* that notwithstanding the right of the carriers to payment at full commercial rates for the transportation of any property for the Government which did not fall within the category of "property of the United States," a carrier might be held to have "*conceded*" the land-grant rate, if, prior thereto, for a considerable period it accepted payment at land-grant rates for the transportation for the Government which was not property of the United States, *without protest or objection on its part*—indeed without, so far as the record before this court showed in that case, having ever claimed any higher rate. But the very

statement of that proposition shows that, *if the carrier referred to in that case had, at the time of payment, protested the requirement of land-grant deductions,* it would have been held by this court to be entitled to recover full commercial rates for such transportation. It is one thing to say that a carrier may *waive* its right to payment in full for a particular class of transportation, and quite a different thing to say that, because it has waived such right for a certain period, it can not afterwards assert it. If there be no waiver, the fact that the payment is prompt is immaterial. It is part of the obligation of the Government to pay as promptly as circumstances will permit, and it is for that reason that Government disbursing officers are provided by law.

It is further to be observed that, in the *Oregon-Washington Case,* the carrier was held to be endeavoring to take advantage of a *mistake in law* which it had apparently made in accepting payment at land-grant rates for the class of transportation involved therein, without any protest on its part. Here, the fact that, after January 1, 1914, the appellant was constantly notifying the disbursing officer of the Government that it was accepting payment by him on land-grant basis *under protest,* shows that appellant was laboring under no mistake as to its legal right to payment at full commercial fares for the classes of persons involved herein.

There is nothing in the Government form of transportation request which justifies the inference of such an agreement as is attempted to be implied by counsel for the Government in this case. Such transportation request is merely, as its name implies, a request by the

Government, through one of its heads of department, for the carrier to whom it is addressed to furnish the person designated therein certain transportation. (See form of Government transportation request set forth in 14 Comp. Dec. 975-976.) The amounts to be charged for such transportation are left by such transportation requests to be determined by the carriers upon the basis of the published tariffs, less land-grant in instances where the persons transported are actually "troops of the United States."

It might here be mentioned that nowhere in the requests is the term "troops of the United States" used.

The rendition by the carriers of their bills, and the payment of the same by the Government is simply a matter of *accounting*, and not of *contract*. The rights and liabilities of the parties have theretofore been fixed by the law and the published tariffs. Neither the disbursing nor the accounting officers of the Government can, by refusing to pay a carrier the amount to which it is lawfully entitled under the published tariffs, as modified by said railroad land-grant laws and equalization agreements, *force a new contract upon the carrier*. The decisions of the Comptroller of the Treasury as to the amounts due for any such service were binding upon the executive departments of the Government but not upon the carrier. The carrier may, of course, *waive* its right to payment at full tariff fares or rates, where the persons or property transported are not "troops and property of the United States," but such *waiver* or *concession* is certainly not to be construed to go beyond the particular case and foreclose the carrier from asserting its right to payment in full in a subsequent case.

It is clear, therefore, that all of the transportation referred to in this case was performed under the understanding and agreement between the Government and the appellant that it would be paid therefor at full *commercial fares*, since the persons transported did not fall within the category of "troops of the United States," and the transportation was not even requested as for "troops of the United States," and it is manifest that appellant cannot properly be held to have waived its right to payment on such basis in any instance in which it accepted payment under protest of the less amount tendered by the Government. Nor should appellant be held to have waived its right to payment at full commercial fares in any instance referred to in this suit occurring subsequent to January 1, 1914, because, as above stated, and as more fully shown in our main brief, the Government was fully apprised, after that date, that appellant was not conceding the land-grant deductions with respect to the classes of persons referred to herein.

The disbursing officer of the Government was, as we have shown in our main brief, the authorized agent of the Government in making the payments referred to herein, and, as we have also shown in our main brief, consequently, notice to the disbursing officer that such payments were being accepted under protest, and as part payment only, was sufficient. Besides there was nothing in the laws of the United States, or in the Departmental regulations enacted in pursuance thereof, which precluded a carrier from asking for and receiving payment (*under protest*) *on the only basis upon which it could be made, either by the disbursing or accounting officers* (in view of the decisions of the

Comptroller of the Treasury which were by statute made binding upon said officers), such protest being made simply to avoid any implication that otherwise might have arisen that the reduced amount received was accepted as in full for the services performed. On the contrary, as we have shown in our main brief, the practice of accepting *part* payment, under such circumstances, under protest, had the recognition and approval of the Comptroller of the Treasury and has also been approved by his successor, the Comptroller General.

And as the practice referred to was (and is) for the convenience of both the Government and the carriers, since it avoids the useless circumlocution, in such cases, of rendering bills at full commercial fares and having them reduced by the officers of the Government to a land-grant basis, and as it was for the convenience of the disbursing officers of the Government in order that they might pay so much of the charges as might be paid under the decisions of the accounting officers, and, further, as it is not inconsistent with the laws of the United States, we think it merits the approval of this Court.

Respectfully submitted,

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